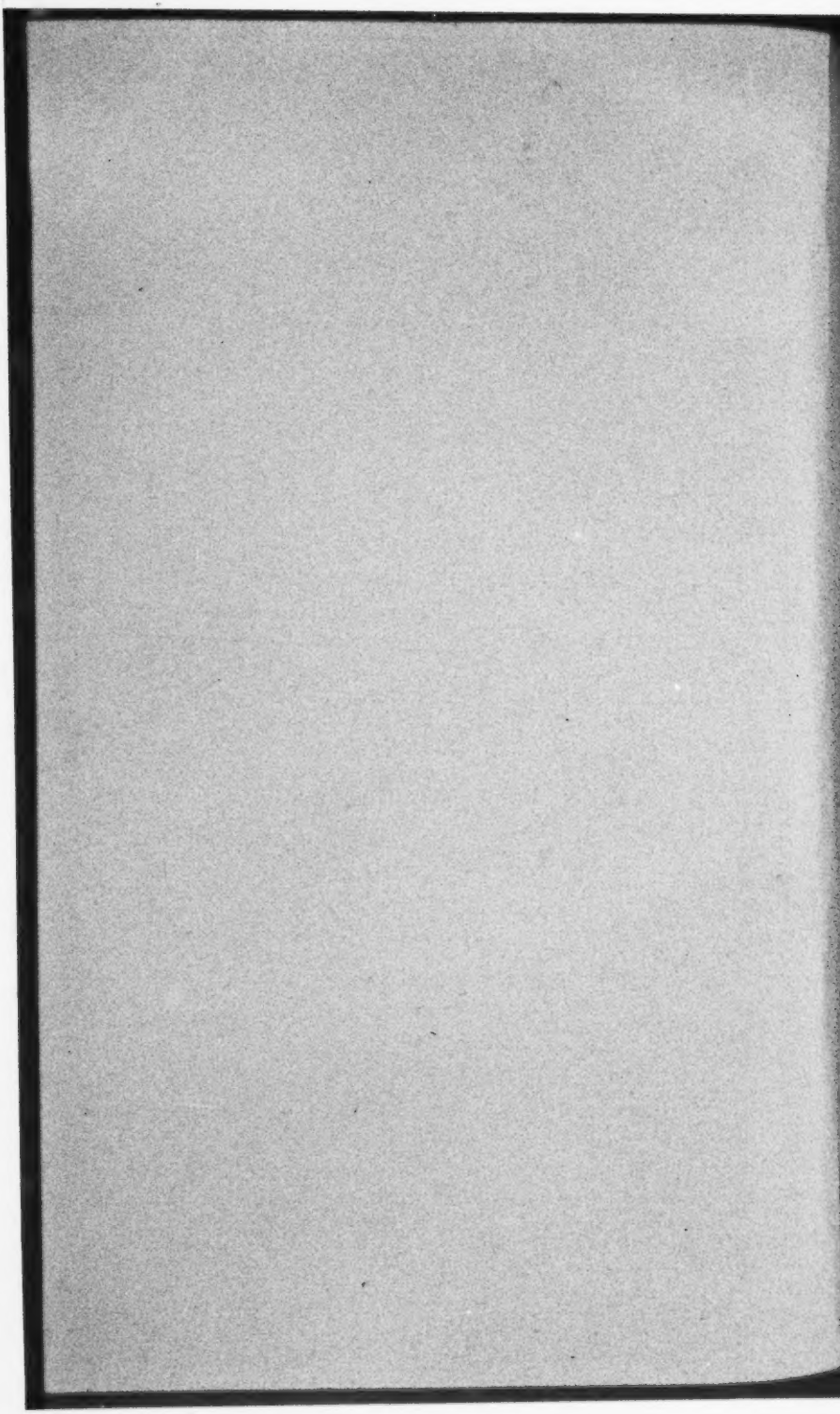

Subject Index of Matter in the Brief.

	Page
TABLE OF CASES—TEXT BOOKS AND STATUTES CITED	iv
REFERENCES TO THE OFFICIAL REPORTS OF THE OPINIONS DELIVERED IN THE COURTS BELOW	vii
STATEMENT OF THE CASE	2
THE STORY OF THE COLLISION	4
THE APPROACH TO COLLISION AS SEEN FROM THE SVEA	8
THE QUESTION PRESENTED	12
SUMMARY OF ARGUMENT	13
OUTLINE OF ARGUMENT	14
ARGUMENT	16
I. The rule requiring the privileged vessel on crossing course to hold course and speed (Article 21) is not unqualified, but is subject to the provisions of the Note to Article 21, the General Prudential Rule (Article 27) and the Rule of Good Seamanship (Article 29), under which, *in special circumstances*, the privileged vessel must depart from her primary duty in order to avoid *immediate danger of collision*	16
II. Under the decisions of this court, a case of *special circumstances* arises and the privileged vessel must depart from her primary duty and take affirmative action to avert collision if she receive distinct indication that the giving-way vessel is about to fail in her duty	27
III. The Svea received such distinct indication but held to her right of way instead of taking affirmative action to avert the threatened collision, and was properly held at fault by the Circuit Court of Appeals	30
1. In a collision occurring, as did this, on the open ocean, with perfect visibility, and nothing to obstruct navigation, there is a pre-	

J51446

Page

sumption of mutual fault, and the vessel (Svea) seeking to be excused must exonerate herself by the clearest evidence. Inapplicability to this case of the rule of presumption and burden of proof argued in the Svea brief (p. 30) ——— 30

2. Apart from presumption, the Svea received distinct indication that the Newport was not going to give way ——— 36

3. The answer to the Svea's argument on "distinct indication" and her philological quibble ——— 37

4. Having received distinct indication, the Svea was at fault for not acting ——— 51

5. The time for action by the Svea was when there was room for her to act effectively so as to avert the threatened collision by her action alone ——— 60

If the court finds, as above submitted, that the Svea had distinct indication and was at fault for not acting thereon, it will be unnecessary to go further. If, however, the court finds otherwise, the next point will be that

IV. Even in the absence of previous distinct indication that the burdened vessel is about to fail in her duty, the privileged vessel must depart from her primary duty of holding course and speed and herself act to avert collision if she can do so when the burdened vessel can no longer avoid her by porting. The Svea could have averted this collision by her own action, even after the Newport could no longer avoid her by porting ——— 62

1. The rule as declared by this court ——— 62

2. The Svea could have averted the collision after the time when the Newport could no longer avoid her by porting ——— 62

V. The claim of the Svea that the Newport could have avoided her by porting until the vessels were

Page

only a ship-length apart is without foundation in the record and such maneuver would be a physical impossibility ____ 64

VI. The authorities relied upon by the Svea do not exonerate her ____ 65

APPENDIX A—Cases in Which the Holding-on Vessel has Been Held in Fault for Failure to Take Timely Action to Avert Collision ____ i

APPENDIX B—Review of Cases Relied on by the Swea ____ xx

Table of Cases—Texts and Statutes Cited.

Table of Cases.

Pages

Admiral Watson, The, 266 Fed. 122 ..... 20, Append. v
America, The, 92 U. S. 432 ..... 19, 31
Aurania and The Republic, The, 29 Fed. 98 21

Binghamton, The, 271 Fed. 69 ..... 30, 34, 35, 60, 63, Append. xxvii
Breakwater, The, 155 U. S. 254 ..... Append. xxv
Britannia, The, 153 U. S. 130 ..... Append. xxiii
Byfoged Christenson, The, 4 App. Cas. 699 ..... Append. xx, xxiii

Charles A. Campbell, The, 142 Fed. 996 55
Chicago, The, 125 Fed. 712 ..... Append. xxix
City of New York, The, 147 U. S. 72 ..... 30, 35
Coamo, The, 280 Fed. 282 ..... 32, 34, 49, 61, Append. x
Comus, The, 19 F. (2d) 774 33
Cygnus, The, 142 Fed. 85 ..... Append. xxix

Delaware, The, 161 U. S. 459 ..... 27, 40, 60, 61, 65
Devonian, The, 110 Fed. 588 ..... 20, 49, Append. xv

George S. Tice, The, 287 Fed. 127 ..... 20, 49, Append. viii
Gulf of Suez, The, 15 Asp. 328 ..... Append. xx, xxii

Haida, The, 191 Fed. 623 ..... 9, Append. xxviii

Jason, The, 288 Fed. 57 ..... 20, 49, 61, Append. xvi
Jones v. Slauson, 112 U. S. 514 22

La Lorraine, 12 F. (2d) 436 20

Montauk, The, 180 Fed. 697 59
Musconetcong, The, 255 Fed. 675 ..... Append. xxxi

Nautik v. Oostvoorne, 6 Lloyds List 110 ..... 47, 61, Append. xxi
New York, The, 175 U. S. 187 ..... 19, 26, 28, 29, 31, 40, 42, 61, Append. i
Non Pareille, The, 33 Fed. 524 21

Pages

Orduna, The, 14 Asp. 574 ..... Append. xx, xxi

Queen Elizabeth, The, 122 Fed. 406 57

Senator Rice, The, 223 Fed. 524 ..... 20, 32, 42, Append. xviii
Shawmut, The, 261 Fed. 616 58
Southern, The, 224 Fed. 210 20
Sunnyside, The, 91 U. S. 208 ..... 19, 21, 25, 28, 31, 40, 61

Tasmania, The, 6 Asp. 517 ..... 30, 35, 53
Tenadores, The, 298 Fed. 740 ..... 31, 34, 42, Append. vii

Victory and The Plymothian, The, 168 U. S. 410 30

West Hartland, The, 2 F. (2d) 834 ..... 34, 39, Append. xi

Yang-Tsze Ins. Assn. v. Furness, Withy & Co., 215 Fed. 859 ..... 31, 33

Zampa, The, 113 Fed. 541 54

TEXTS.

Knight—Modern Seamanship, 8th ed., p. 326 ff. 63, 64

La Boyteaux—The Rules of the Road at Sea, p. 178 8

Smith—The Law Relating to the Rules of the Road at Sea, p. 169 34

STATUTES.

13 Stat. 58, et seq.—*Regulations for Preventing Collisions on Water* (1864) 22
Article 16 25
Article 18 ..... 23, 24
Article 19 22
Article 20 22

Pages

R. S. 4233, et seq.—*Rules for Preventing Collisions* 22

Rule 21 25

Rule 23 ..... 23, 24

Rule 24 22

23 Stat. 438, et seq.—*Revised International Regulations for Preventing Collisions at Sea* (1885) 23

Article 18 25

Article 22 24

Article 23 23

Article 24 24

26 Stat. 320, et seq.—*Regulations for Preventing Collisions at Sea* (1890—Present International Rules) 24

Preliminary Note to Steering and Sailing Rules 5, 16

Article 12 ..... 8, 10

Article 19 17

Article 21 17

Article 22 17

Article 23 17

Article 27 18

Article 28 9

Article 29 19

28 Stat. 83—Note to Article 21 of 26 Stat. 320 ..... 17, 24

30 Stat. 96, et seq.—*Regulations for Preventing Collisions in Inland Waters* (Present Inland Rules)

Article 18, Rule III ..... 11, 39, Append. xiii

Article 25 ..... Append. viii

References to the Official Reports of the Opinions Delivered in the Courts Below.

Pages

Opinion of the District Court for the Southern District of California: Southern Division:

The Newport, 2 F. (2d) 255 2

Opinion of the Circuit Court of Appeals for the Ninth Circuit:

The Newport, 15 F. (2d) 342 3

In the Supreme Court
OF THE
United States

OCTOBER TERM, 1927

Nos. 146 and 173.

HENRY WILSON, F. A. WILSON, W. T. WILSON, et al.,

Petitioners,

vs.

PACIFIC MAIL STEAMSHIP COMPANY, STEAMSHIP NEWPORT, her engines, boilers, tackle, etc., and J. MCKINNON, Master of said vessel,

Respondents.

No. 146

PACIFIC MAIL STEAMSHIP COMPANY, Claimant of the STEAMSHIP NEWPORT, her engines, boilers, tackle, etc., and J. MCKINNON, Master of said vessel,

Cross-Petitioners.

vs.

HENRY WILSON, F. A. WILSON, W. T. WILSON, et al.,

Cross-Respondents.

No. 173

BRIEF FOR RESPONDENTS IN CASE No. 146.

STATEMENT OF THE CASE.

THE CAUSES IN CAPTION—CERTIORARI ON PETITION AND CROSS-PETITION—CONSOLIDATION FOR HEARING IN THIS COURT—CASE IS COLLISION IN ADMIRALTY—POINTS INVOLVED—THIS IS RESPONDENTS' BRIEF IN CAUSE 146—CROSS-PETITIONERS' BRIEF IN CAUSE NO. 173 ALREADY FILED.

These two causes are here on petition and cross-petition for certiorari which has been granted in each. They involve review of a single case below (though each is concerned with a different aspect of it) and were consolidated for hearing in this Court by order entered May 16, 1927. Petitioners in Cause No. 146 are cross-respondents in Cause No. 173 and vice versa.

The case is in admiralty. The steam schooner Svea and the steamer Newport were in collision, November 29, 1922. The Svea interests libeled and the Newport interests cross-libeled. The Newport admitted fault, asserting, however, that the Svea was also to blame; pleaded, in other words, that it was a mutual fault collision. The Svea denied fault and pleaded that the collision was due to the sole fault of the Newport.

The District Judge held the Newport solely at fault (63)* and entered up a decree (55) against the Newport and her owner, Pacific Mail Steamship Company; also against George (J.) McKinnon,** her master. While admitting fault, as above stated, the Newport pleadings denied the master's personal participation therein (30).

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*Figures in parentheses, except where otherwise specified, refer to pages of the Record.

**Captain McKinnon was called "J" McKinnon in the Svea's original libel, and that description has continued through the titles of the pleadings, etc., though "George" McKinnon is the correct name. (33, 104.)

The owners of the Newport and Captain McKinnon appealed from the judgment of the District Court, upon the ground that the court erred in not holding the Svea in mutual fault with the Newport and in entering any judgment against Captain McKinnon. The Circuit Court of Appeals for the Ninth Circuit reversed that part of the judgment holding the Newport solely at fault and held both vessels to blame. It affirmed that part of the judgment holding Captain McKinnon personally liable for the negligence of the Newport's third officer.

These are the two branches of the case and the points of the two writs of certiorari. Petitioners in Cause No. 146 ask review of the finding of mutual fault. They are the owners of the Svea. Their claim is that the Newport should be held solely to blame for the collision and the Svea exonerated. Their petition was filed November 29, 1926, and certiorari was granted January 10, 1927.

Cross-petitioners in Cause No. 173 ask review of the personal judgment against the Master of the Newport. The cross-petitioners are the owner and master (Pacific Mail Steamship Company and George—J.—McKinnon) of the Newport. Their claim is that both the courts below erroneously held Captain McKinnon personally liable for the negligence of his subordinate officer—that, however the case may finally fall as to fault for the collision as between the two vessels and their owners, he should be relieved. The cross-petition was filed January 28, 1927, and certiorari was granted March 14, 1927.

This is the brief for the respondents in Cause No. 146. It deals with the question whether the Newport alone is

to blame for the collision as held by the District Court or whether it is properly a case of mutual fault as held by the Circuit Court of Appeals.

We have a separate brief on file on the cross-petition in Cause No. 173, dealing with the question of the soundness of the personal judgment against the Newport's captain.

THE STORY OF THE COLLISION.

The place of the collision was in the Pacific Ocean, about 12 miles off the shoreline north of San Luis Obispo Bay, California, and the time 9:53 in the morning. The vessels were approaching on converging courses and were in view of each other from the time they came on the horizon under a visibility variously estimated from 10 to 20 miles. It was a bright, sunny morning; the sea calm and the wind negligible. No other vessels were in sight. In short, the conditions were ideal for the avoidance of collision. There could hardly be a more perfect setting for that kind of a collision which the courts have often said it is hard to conceive as occurring without *mutual* fault.

The Newport was southbound from San Francisco to South American ports; the Svea northbound from Ventura, California, to San Francisco. The crossing courses (that of the Newport south 79° east magnetic and that of the Svea northwest by north ½ north magnetic) were such that from the time the vessels were in view of each other the Newport had the Svea on her starboard side

about 3 points off her starboard bow, and the Svea similarly had the Newport about 3 points off her port bow. From the time the two vessels came in sight of each other, long before the collision and right up to the collision, the bearings never changed. Thus, from beginning to end, the risk of collision existed.* Traveling at their respective full speeds of 10 knots for the Newport and 7½ knots for the Svea, the two ships went without alteration of course** or slackening of pace*** straight up to the fatal, and under these conditions, inevitable point of intersection and collision.

The collision was about right-angled, stem of the Newport to amidships of the Svea, and both vessels sustained heavy damages. It looked to the Svea at first as if the Newport were going to sink (189), but she made port under her own power without mishap. The Svea, despite the efforts of her officers and crew, turned over on the evening of the collision, but was afterwards towed into San Francisco and repaired.

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*Risk of collision can, when circumstances permit, be ascertained by carefully watching the compass bearing of an approaching vessel. If the bearing does not appreciably change, such risk should be deemed to exist.
(Preliminary Note to Steering and Sailing Rules, 26 Stat. 326.)

**The Svea ported 100 feet before the impact, but this was within seconds of the collision, and according to her master (187) and mate (153) she did not feel the helm. In other words, for all practical purposes she continued her course right up to the collision.

So did the Newport. An answer to an interrogatory says that her helm was put hard astarboard before the collision (33), but there is no very distinct evidence of this (124), and the Newport's cross-libel admits that she maintained her course until less than a minute immediately preceding the collision (21). At any rate the Svea was at all times until about 9:53 a. m.—the collision time—on the Newport's starboard bow (148), and we make no claim of any change of bearing as the vessels drew together or of any helm action by the Newport to fulfill her duty to go under the Svea's stern.

***The Svea stopped her engines as the vessels came together (154, 203). At this time the Newport's engines were going full astern (122), but they had only just been put so, as it is agreed on both sides that there was no alteration of bearings up to the collision, and the Newport pleadings admit failure to slacken speed, stop or reverse on approaching the Svea.

The Newport, as we have stated, admitted fault from the outset—that is to say, in the pleadings (21, 31).

Under the International Rules, which are related and discussed below*, the Newport was the giving-way vessel and was required to keep out of the way of the Svea. She failed to do so, though she had the wide ocean and a clear day in which to maneuver, and we neither pleaded, nor attempted to prove, any excuse.

The master of the Newport, Captain McKinnon, had stepped off the bridge some twenty minutes before the collision to go below, leaving the bridge in charge of his duly licensed third officer, who was on his regular watch there (105, 117). The captain while in the lavatory caught a glimpse of the oncoming Svea through a port hole just before the collision and rushed to the bridge in time to see it occur, but without opportunity at that last moment to do anything to avert it (105).

Svea counsel took the deposition of the third officer, and he testified that he saw the Svea eight minutes before the collision (118). He told the master that he was on the bridge, but neither saw nor heard the Svea (118, 122). The master did not believe he stayed on the bridge, but thinks he had left it and was in the chart room (118, 119). Nor do we believe him, for it seems inconceivable to us that a licensed officer could have been on the bridge without seeing or hearing the Svea, or, having seen or heard her, could have taken no action when his was the burdened vessel and bound to keep out of the way. We therefore did not call him and have no quarrel with the

*See page 16 infra.

finding of the District Court that he was not on the bridge (65). The master's testimony that he thinks the mate must have been in the chart room seems reasonable in view of the testimony of the officers of the Svea (reviewed below) that they had the Newport under concentrated observation for eight miles and half an hour, and at no time saw anyone on her bridge and expressed concern to each other about it.

The fault of the Newport being admitted, the only question in the case (apart from that of Captain McKinnon's personal liability, which is dealt with in the briefs in Cause No. 173) is whether the Svea was at fault also. The Circuit Court of Appeals, after reviewing what was seen and noted from her bridge, found that it became distinctly apparent to her that the Newport was going to fail in her duty to keep out of the way, and that the Svea, though the privileged vessel, was to blame for standing on her right of way straight into the collision, instead of taking some affirmative action herself to avoid it. It therefore becomes important to inquire what transpired on the Svea's bridge, and what was seen and noted by her officers during the long approach to the collision.

The statement in the Svea's brief is meager. It omits features (such as failure to see anyone on the Newport's bridge) which seem to us very material in determining whether the Svea had distinct indication that the Newport was about to fail in her duty. We therefore venture to relate somewhat more fully

THE APPROACH TO COLLISION AS SEEN FROM THE SVEA.

The time of the collision was 9:53 in the morning of the day in question. Half an hour before (about 9:20) the master of the Svea sighted the Newport about three points on his port bow, approximately eight miles distant (182). At 9:30, the mate joined Captain Rohberg on the bridge and they discussed what vessel the Newport might be. She was then about six miles away on the same bearing (184, 151). The mate put his glasses on the Newport and finally concluded that it was one of the Pacific Mail boats. When the vessels were about three miles apart and the bearing had not changed, the mate said, "I wonder what he is going to do," and the captain remarked that the situation "didn't look very good" (184). They were naturally concerned about the unchanging bearing, for that meant risk of collision. The Svea proceeded until the vessels were something more than two miles apart, and still the Newport's bearing did not change. So the Svea gave a one-blast whistle to attract the Newport's attention (151, 185).* This was when the Newport was still over two miles distant (152, 184, 185). Under the circumstances the mate regarded this as "close to us, very close" (151), and was evidently apprehensive. They ex-

*The master of the Svea gave this one blast signal under the impression that it was the proper passing signal calling for a port to port passing (200). As a matter of fact, this is not a proper signal under the International Rules. The only signal proper for the holding-on vessel under the International Rules is a detonating signal to attract attention.

"Every vessel may, if necessary in order to attract attention, in addition to the lights which she is by these Rules required to carry, show a flare-up light or use any detonating signal that cannot be mistaken for a distress signal." (Art. 12, International Rules, 26 Stat. 325.) The signal given would have been proper under the Pilot Rules had the vessels been in inland waters, to signify that the privileged vessel was proposing to fulfil her primary duty to hold course and speed. (*Le Boyteaux, The Rules of the Road at Sea*, p. 178.)

pected an answer, but got none (152, 185), and, although the master of the Svea took particular pains to look, no steam came from her whistle (185). The Svea's one blast was supererogation. The holding-on vessel is not required under the International Rules to signal her intention of performing her primary duty of holding her course and speed.* Nevertheless, the Svea, having whistled her approach, naturally anticipated some signal or sign from the Newport that she was taking steps to get out of the way now that the margin between them was narrowing. Persistence on the present courses with unchanging bearings could only lead to collision. The move was the Newport's, as she was the burdened vessel. If she changed her helm or reversed her engines her duty was to signal the same, under Article 28 of the International Rules.** If she slackened speed or stopped her engines those steps would be manifested by alteration of bearings. There was none (198). Just before the one-blast signal was blown the mate again put his glasses on the Newport and made out her name (163, 185). But, though he scanned her bridge, apparently wondering why she did not answer the whistles, he "saw no activity on the bridge at all" (163).

The Svea proceeded with course and speed unaltered until the vessels were a mile apart, and then (as noted

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*See *The Haida*, 191 Fed. 623, at page 626.

**Article 28. The words "short blast" used in this article shall mean a blast of about one second's duration.

When vessels are in sight of one another, a steam-vessel under way, in taking any course authorized or required by these rules, shall indicate that course by the following signals or whistle or siren, namely:

One short blast to mean, "I am directing my course to starboard."

Two short blasts to mean, "I am directing my course to port."

Three short blasts to mean, "My engines are going at full speed astern." (26 Stat. 328.)

below) blew the danger signal. The mate of the Svea testifies as follows concerning this interval:

"Q. Between the time you blew the one whistle and the time you blew the first four-blast signal, did you have your glasses on her from time to time?

A. Not right along.

Q. Did you have your glasses on her from time to time during that interval? A. I don't remember if I did, or not, but I never saw anybody on the bridge.

Q. Did you look for anybody? A. Yes, I looked up there, and I passed the remark to the old man, 'I don't see anybody on the bridge.' I didn't know why they didn't answer the whistles.

Q. That was before you blew the first four blasts?

A. Yes.

Q. You never say (saw) anybody. A. No.

Q. And you didn't hear any signals? A. No.

Q. And she didn't seem to be changing at all?

A. Not to me.

Q. And her bearing seemed to be the same?

A. I didn't take no bearing of her, but her position looked to be the same.

Q. And you kept your course and speed?

A. Yes." (163-164.)

This was the situation until the vessels were a little over a mile apart. The combination of circumstances (non-response by signal or action to the one-blast signal; seemingly deserted bridge; constant three-point bearing, significantly pointing to collision unless one of the vessels did something) gave Captain Rohberg concern. He says that he thought something was wrong, and that he ought to give a danger signal, which he did—four short blasts (152, 164, 185, 201).

The International Rules, as we have already mentioned, do not provide for such a signal. The "detonating signal" (Article 12, 26 Stat. 325) should be used by a vessel

desiring to attract the attention of another. However, the four short blasts signal of the Inland Rules* which was used would serve to draw the Newport's attention to the Svea's presence and would elicit response by signal or alteration of bearing if the Newport did anything to avoid the threatening collision. The Svea's mate testified concerning this four-blast signal:

> "Q. How far away were you when you blew four whistles? A. Perhaps a mile off. He did not notice our first whistle, and we waited a while, and then we blew several small whistles, the captain did, so as to draw his attention. There was no answer to that, either.
>
> Q. The captain blew the whistles, did he?
>
> A. Yes.
>
> Q. After you blew the four short blasts, then what did you do? A. We waited a while, expecting him to take action; he was closing in on us and we blew four more when he was close in." (152.)

The Newport signaled nothing and did nothing in response to the danger signal (152, 185).

> "Q. And your idea in blowing the danger signal was to try and get somebody to do something over there? A. Yes, sir.
>
> Q. And you were not getting any signals from him? A. No."
>
> (Testimony of Captain of the Svea, 200.)

The vessels were coming closer and closer together, with the Newport's bearing remaining unchanged and no activity visible on her bridge (164, 200).

---

*Article 18, Rule III. If, when steam-vessels are approaching each other, either vessel fails to understand the course or intention of the other, from any cause, the vessel so in doubt shall immediately signify the same by giving several short and rapid blasts, not less than four, of the steam-whistle. (30 Stat. 100.)

The same combination of circumstances existed when the vessels had drawn to a little over three-eighths of a mile apart (186), about one-half mile according to counsel for the Svea (72), and Captain Rohberg blew a second danger signal of four blasts (186). Referring to this signal, the captain testified:

> "Q. What did you blow your distress signal for?
> A. To call his attention to me. It did not look good to me then, the way things looked." (199.)

Still no response either by signal or change of course or bearing on the part of the Newport, nor any observation of any sign of life on her bridge.

> "Q. And at no time did you see any activity on the bridge of the Newport?
> A. No, sir, I never did."
>
> (Testimony of mate of the Svea, 164.)

The two vessels churned their way without touching helm or engines* to inevitable intersection and collision.

THE QUESTION PRESENTED.

The Newport having admitted fault, the only question for decision, as we conceive it, is whether under the circumstances outlined above the Svea was justified in persisting in her course and speed to the point of collision instead of taking some affirmative action to avoid it.

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*Except for last moment helm and engine changes given in the footnotes on page 5, supra, which did not affect the situation.

SUMMARY OF ARGUMENT.

Briefly summarized, our argument is as follows:

The rule requiring the privileged vessel on crossing courses to hold her course and speed is not unqualified but is subject to the Note appended to that rule and to the General Prudential Rule and the Rule of Good Seamanship under which the privileged vessel must, in special circumstances, depart from her primary duty to avoid immediate danger. Under the decisions of this Court, such special circumstances arise and call for affirmative action by the privileged vessel to avoid immediate danger when she has distinct indication that the burdened vessel is about to fail in her duty. The Svea in this case received distinct indication—or, in the words of the Circuit Court of Appeals, it became "distinctly apparent"* to her—that the Newport was about to fail in her duty. Disregarding such distinct indication, the Svea persisted in her right of way to the point of collision, and is therefore in mutual fault with the Newport for its occurrence.

If this court finds that the Svea had such distinct indication, it will be unnecessary to go further; for she admittedly failed to act upon it. If, however, the finding of this court should be against distinct indication, we submit that the Svea should still be held at fault under the law as stated by this court, because the Svea could have acted and averted the collision after the Newport could not longer avoid her by porting. The chapters of the argument will accordingly be as follows:

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*The perverted construction which the Svea brief (p. 18) puts on "apparent" is considered later. See p. 37 infra.

OUTLINE OF ARGUMENT.

I.

The rule requiring the privileged vessel on crossing course to hold course and speed (Article 21) is not unqualified, but is subject to the provisions of the Note to Article 21, the General Prudential Rule (Article 27) and the Rule of Good Seamanship (Article 29), under which, *in special circumstances,* the privileged vessel must depart from her primary duty in order to avoid *immediate danger of collision.*

II.

Under the decisions of this court, a case of *special circumstances* arises and the privileged vessel must depart from her primary duty and take affirmative action to avert collision if she receive distinct indication that the giving-way vessel is about to fail in her duty.

III.

The Svea received such distinct indication but held to her right of way instead of taking affirmative action to avert the threatened collision, and was properly held at fault by the Circuit Court of Appeals.

1. In a collision occurring, as did this, on the open ocean, with perfect visibility, and nothing to obstruct navigation, there is a presumption of mutual fault, and the vessel (Svea) seeking to be excused must exonerate herself by the clearest evidence. Inapplicability to this case of the rule of presumption and burden of proof argued in the Svea brief (p. 30).

2. Apart from presumption, the Svea received distinct indication that the Newport was not going to give way.

3. The answer to the Svea's argument on "distinct indication" and her philological quibble.

4. Having received distinct indication, the Svea was at fault for not acting.

5. The time for action by the Svea was when there was room for her to act effectively so as to avert the threatened collision by her action alone.

If the court finds, as above submitted, that the Svea had distinct indication and was at fault for not acting thereon, it will be unnecessary to go further. If, however, the court finds otherwise, the next point will be that

IV.

Even in the absence of previous distinct indication that the burdened vessel is about to fail in her duty, the privileged vessel must depart from her primary duty of holding course and speed and herself act to avert collision if she can do so when the burdened vessel can no longer avoid her by porting. The Svea could have averted this collision by her own action, even after the Newport could no longer avoid her by porting.

1. The rule as declared by this court.

2. The Svea could have averted the collision after the time when the Newport could no longer avoid her by porting.

V.

The claim of the Svea that the Newport could have avoided her by porting until the vessels were only a ship-

length apart is without foundation in the record and such maneuver would be a physical impossibility.

VI.

The authorities relied upon by the Svea do not exonerate her.

ARGUMENT.

I.

THE RULE REQUIRING THE PRIVILEGED VESSEL ON CROSSING COURSES TO HOLD COURSE AND SPEED (ARTICLE 21) IS NOT UNQUALIFIED, BUT IS SUBJECT TO THE PROVISIONS OF THE NOTE TO ARTICLE 21, THE GENERAL PRUDENTIAL RULE (ARTICLE 27) AND THE RULE OF GOOD SEAMANSHIP (ARTICLE 29), UNDER WHICH, IN SPECIAL CIRCUMSTANCES, THE PRIVILEGED VESSEL MUST DEPART FROM HER PRIMARY DUTY IN ORDER TO AVOID IMMEDIATE DANGER OF COLLISION.

As this collision took place on the high seas, the International Rules (26 Stat. 320) apply. These rules are printed in convenient form in columns paralleling the Inland Rules in Department of Commerce Circular No. 230, dated June 8th, 1917, and entitled: "Rules to Prevent Collisions of Vessels." They are also given in convenient form in the Rules of the Road at Sea by W. H. La Boyteaux, New York, Baker, Voorhis & Co., 1920.

Preliminary Note to Steering and Sailing Rules.

26 Stat. 326:

Risk of collision can, when circumstances permit, be ascertained by carefully watching the compass bearing of

an approaching vessel. If the bearing does not appreciably change, such risk should be deemed to exist.

Article 19, 26 Stat. 327:

When two steam-vessels are crossing, so as to involve risk of collision, the vessel which has the other on her own starboard side shall keep out of the way of the other.

Article 21, 26 Stat. 327:

Where, by any of these rules, one of two vessels is to keep out of the way, the other shall keep her course and speed.

*Note—when, in consequence of thick weather or other causes, such vessel finds herself so close that collision can not be avoided by the action of the giving-way vessel alone, she also shall take such action as will best aid to avert collision. (See articles twenty-seven and twenty-nine.)

Article 22, 26 Stat. 327:

Every vessel which is directed by these rules to keep out of the way of another vessel shall, if the circumstances of the case admit, avoid crossing ahead of the other.

Article 23, 26 Stat. 327:

Every steam-vessel which is directed by these rules to keep out of the way of another vessel shall, on approaching her, if necessary, slacken her speed or stop or reverse.

The foregoing may be termed the primary rules of the road for steam vessels crossing so as to involve risk of

*The Note was added by amendment in 1894, 28 Stat. 83. See infra, p. 24.

collision. *Primary* because they are not absolute or unqualified, but, like the law before codification, recognize that the object after all is to prevent collision. The primary rules themselves must therefore give way when literal adherence to them would promote rather than avert collision. The "right of way" or "duty to hold on" is of course not a vested right (to which one has title or claim, on which he may legally insist) or an absolute duty (to which he *must* conform) though doing so may involve loss or disaster for others. Such disaster, the sacrifice of the lives and property of innocent persons as well as of the navigator, is the very thing that the right of way, or duty to hold on, like the other rules of navigation, is designed to avoid and when it appears that standing on a right of way or clinging regardless to a duty is going to defeat rather than promote that beneficent end the right of way must be surrendered—the duty departed from. No captain is entitled to imperil his and the other vessel and the persons aboard them in order to defend his right of way, or hold to a primary duty.

So we find the foregoing *primary* rules qualified by other rules. The note to Article 21 refers specifically to what are commonly called the General Prudential Rule or Rule of Special Circumstances:

Article 27, 26 Stat. 327:

> In obeying and construing these rules due regard shall be had to all dangers of navigation and collision, and to any special circumstances which may render a departure from the above rules necessary in order to avoid immediate danger.

and The Rule of Good Seamanship:

Article 29, 26 Stat. 328:

Nothing in these rules shall exonerate any vessel, or the owner or master or crew thereof, from the consequences of any neglect to carry lights or signals, or of any neglect to keep a proper look-out, or of the neglect of any precaution which may be required by the ordinary practice of seamen, or by the special circumstances of the case.

These rules by their very terms, qualify all the other rules thus recognizing and enforcing the doctrine of this court that

> "every navigator ought to know that rules of navigation are ordained, not to promote collisions, but to save life and property by preventing such disasters".
>
> *The Sunnyside,* 91 U. S. 208, 222,
>
> quoted in
>
> *The New York,* 175 U. S. 187

that

> "* * * rules of Navigation are ordained to preserve life and property, and not to permit or authorize collision. Even flagrant fault committed by one of two vessels approaching each other from opposite directions, will not excuse the other from adopting every proper precaution to prevent a collision."
>
> *The America,* 92 U. S. 432, 438.

The lower Federal courts have repeatedly called attention to the qualification under special circumstances of the primary rules. The following are typical statements:

> "* * * no code of navigation gives leave to run into collision; the saving rule of special circumstances

flavors every other rule with the salt of caution and common sense."

La Lorraine, 12 F. (2nd) 436, 437 (2nd C. C. A.).

"The primary purpose of rules of navigation, as said by the Supreme Court, is not to fix arbitrary rights of the road to vessels, but rather for the safety of life and property."

The Admiral Watson, 266 Fed. 122.

"But over and underlying all the rules of navigation is that rule of common sense, so often referred to, that no one has the right to run into collision."

The George S. Tice, 287 Fed. 127 (2nd C. C. A.).

"Where property and life are at stake, neither party should insist upon persisting in a course which is likely to result in disaster, when the delay of a few moments will insure the safety of both."

The Senator Rice, 223 Fed. 524 (2nd C. C. A.).

"But the privileged vessel is to hold her course, constantly observing the burdened vessel in order to notice if the latter fails in her duty. When the failure of the burdened vessel becomes apparent, the privileged vessel must change her course, as prudence commands."

The Devonian, 110 Fed. 588.

"No privilege exempts a vessel from using ordinary common sense to escape from danger."

The Southern, 224 Fed. 210.

"As was held in the John H. Starin, 162 Fed. 146, 89 C. C. A. 170, there is no right of way on which a vessel is entitled to insist, when it is obvious that it will result in collision."

The Jason, 288 Fed. 57, 61.

"There is no such thing as a 'right of way' to run into unnecessary collision. The rules of navigation are for the purpose of avoiding collision; not to justify either vessel incurring a collision unnecessarily. The supreme duty is to keep out of collision."

The Non Pareille, 33 Fed. 524, 526.

"Whenever danger of collision has become manifest, and the vessel previously bound to avoid it is plainly neglecting her duty to do so, the circumstances are special, and the other vessel must do what she can to prevent disaster. If this rule were not acted on and rigidly enforced, disastrous collisions would arise daily, and the lives and property of innocent persons be sacrificed to a tenacious adherence to the mere right of way; * * *."

The Aurania and *The Republic,* 29 Fed. 98, 126, 127.

These qualifying rules are not printed among the other international rules "applicable" on page 10 of the Svea's brief, though quoting the Note to Article 21 necessarily involved a reference to them by number. Otherwise they are ignored throughout the Svea's brief.

As this court states in *The Sunnyside,* supra, even before the adoption by Congress of rules to prevent collision, it was a fundamental principle of collision law that no general rule of navigation granted a vessel the right (or, accepting the expression preferred by our opponents, imposed the duty) to run into collision; it having always been the law that, irrespective of rule or privilege, a vessel must adopt all such reasonable and necessary precautions to prevent collision as the circumstances in which she is placed give her the opportunity to employ.

Once codification began, the history of the Congressional enactments to prevent collisions at sea shows continuous recognition of "the saving rule of special circumstances." Congress first enacted rules of the road at sea in 1864, applicable both to collisions at sea and in inland waterways. These rules are in 13 Stat. 58 and Rev. Stat. Section 4233, et seq. This enactment contained the General Prudential Rule or Rule of Special Circumstances in practically the same language as it stands today. It appears in the 1864 enactment as rule 19 of 13 Stat. 58 and rule 24 of the Revised Statutes as follows:

> "In construing and obeying these rules, due regard must be had to all dangers of navigation, and to any special circumstances which may exist in any particular case rendering a departure from them necessary to avoid immediate danger."

The rules of 1864 similarly contained the substantial equivalent of the present Article 29 often called The Rule of Good Seamanship. This was Article 20 of 13 Stat. 58. It was never repealed but was not incorporated into the Revised Statutes—apparently, as this court states in *Jones v. Slauson,* 112 U. S. 514—by inadvertence. In the case just cited, this court says, however, that

> "Though thus not carried into the Revised Statutes, it will nevertheless be enforced as part of the general law of navigation."

It is to be noted that the rule in the enactment of 1864 requiring the privileged vessel to keep her course is by its terms tied directly into the General Prudential Rule or Rule of Special Circumstances. This is rule 18 of

13 Stat. 58 and 23 of Rev. Stat. Section 4233, et seq., and reads:

> "Where, by Rules seventeen, nineteen, twenty and twenty-two, one of two vessels shall keep out of the way, the other shall keep her course, *subject to the qualifications of Rule twenty-four.*" (Italics ours). (Rule twenty-four was the General Prudential Rule which we have quoted above.)

In 1885 Congress adopted the "Revised International Rules and Regulations for Preventing Collisions at Sea" (23 Stat. 438). These apply only to vessels at sea and not to inland waters, and contained in Articles 23 and 24 the present Articles 27 and 29: that is to say, the present General Prudential Rule or Rule of Special Circumstances and the present Rule of Good Seamanship. In this enactment of 1885 the privileged vessel rule does not refer as theretofore in its terms to the Special Circumstance Rule, but both the Special Circumstance and Good Seamanship Rules, then as now, by their own express terms, qualified all the other rules.

Thus, Article 23 of the Rules of 1885 (the present Article 27) reads:

> "Art. 23. *In obeying and construing these rules* due regard shall be had to all dangers of navigation, and to any special circumstances which may render a departure from the above rules necessary in order to avoid immediate danger." (Italics ours),

and Article 24 of the Rules of 1885 (the present Article 29) reads:

> "Art. 24. *Nothing in these rules shall exonerate* any ship, or the owner, or master, or crew thereof,

from the consequences of any neglect to carry lights or signals, or of any neglect to keep a proper look-out, or of the neglect of any precaution which may be required by the ordinary practice of seamen or by the special circumstances of the case." (Italics ours.)

The present International Rules of the Road at Sea are those of 1890 and are set forth in 26 Stat. 320. They represent the adoption by Congress of the revision of the rules as made by the International Marine Conference held at Washington, D. C. in 1889. Like the Rules of 1885 they apply only to vessels on the high seas, not to inland waters. As originally adopted, Article 21 prescribing the duty of the privileged vessel to keep her course and speed, contained no specific reference to the General Prudential Rule or Rule of Special Circumstances (Article 27) and the Rule of Good Seamanship (Article 29). In 1894,* however, Congress adopted the Note to Article 21 which is now a part of it (see page 17, supra), and which specifically refers to, and ties Article 21 in with, Articles 27 and 29, that is to say, the General Prudential Rule, or Special Circumstances Rule and the Rule of Good Seamanship, respectively.

It is quite true, that under the Rules of 1864 and 1885, the privileged vessel was only required to hold her course (Article 18 of 13 Stat. 58; Rule 23 of Rev. Stats. Section 4233, et seq; Article 22 of 23 Stat. 438) whereas, under Article 21 of the present rule, the privileged vessel is to hold her course *and speed.*

*28 *Stat.* 83.

It is furthermore true, as Svea counsel state (Svea Brief, p. 9), that under the two previous enactments—those of 1864 and 1885—*every* steamship when approaching another vessel so as to involve risk of collision was required to slacken her speed or, if necessary, stop and reverse. (Article 16 of 13 Stat. 58; Rev. Stat. Section 4233, et seq. Rule 21; Article 18 of 23 Stat. 438;) whereas, in the present Rules of 1890 this is enjoined only on the *burdened* steam vessel by Article 23 as quoted in the earlier part of this chapter.

It seems to be the view of counsel for the Svea that this change in the rules means that the privileged vessel, even under special circumstances, may now hold her course and speed right into the jaws of collision, that is to say, until the vessels are actually *in extremis*. It was when approaching another vessel "so as to involve risk of collision" that every steam vessel was required under the old rules to slacken speed or, if necessary, stop or reverse. Mere *"risk of collision"* therefore does not justify the privileged vessel in departing from her course and speed under the present rules. But her duty to hold course and speed remain subject to the qualifying rules, so that she must still yield her primary right, or, as counsel for the Svea prefer to put it, depart from her primary duty, when that is necessary *"to avoid immediate danger."*

This is the express mandate of the rules themselves. It follows, also, from the decision of this court in *The Sunnyside*, 91 U. S. 208. We review this case at some length in the argument. It will suffice to say here for present purposes that in that opinion this court condemned a

sailing vessel for not departing from her primary obligation to hold her course when it was indicated to her that the burdened steam vessel was not going to keep out of the way. This court held that the case was one of special circumstances calling for action by the privileged vessel to avert the collision. While *The Sunnyside* was governed by the *Rules of 1864* the decision is exactly in point. For there, the privileged vessel was a sailing vessel and the obligation under the old rules to slacken speed or stop or reverse when there was risk of collision did not apply to *sailing* vessels, but was in terms restricted to *steam* vessels. A privileged *steam* vessel under the present Rules stands in precisely the same position as did the privileged *sailing* vessel in *The Sunnyside,* and the principle holds.

The New York, 175 U. S. 182, like *The Sunnyside,* arose under the Rules of 1864. Its importance in the *general* argument is considered later on. Its importance in the present connection is that like *The Sunnyside* it demonstrates (if demonstration be needed beyond the mandate of the rules themselves which we doubt) that, whether or not the privileged vessel be under the old rule to slacken speed or stop or reverse when approaching another vessel so *as to involve risk of collision,* she must take affirmative action under the Special Circumstances Rule *to avoid immediate danger.* The opinion after directing attention to the Rule of Special Circumstances and pronouncing that

> "* * * the fact that a steamer is entitled to hold her course does not excuse her * * * from adopting such precautions as may be necessary to prevent a

> collision, in case there be a distinct indication that the obligated steamer is about to fail in her duty"

goes on to state that

> "There is *another* rule pertinent in this connection" (Italics ours),

citing the rule that every steam vessel when approaching another ship so as to involve risk of collision shall slacken speed, or, if necessary, stop or reverse.

In other words the privileged vessel in *The New York* was condemned under the Special Circumstance Rule and *separately* under the other rule.

II.

UNDER THE DECISIONS OF THIS COURT, A CASE OF SPECIAL CIRCUMSTANCES ARISES AND THE PRIVILEGED VESSEL MUST DEPART FROM HER PRIMARY DUTY AND TAKE AFFIRMATIVE ACTION TO AVERT COLLISION IF SHE RECEIVE DISTINCT INDICATION THAT THE GIVING WAY VESSEL IS ABOUT TO FAIL IN HER DUTY.

There is no dispute concerning the principle of law to be applied to the case. Petitioners base their case on

> *The Delaware,* 161 U. S. 459,

which we accept. The negative statement in *The Delaware*:

> "that the preferred steamer will not be held in fault for maintaining her course and speed, so long as it is possible for the other to avoid her by porting; *at least in the absence of some distinct indication that she is about to fail in her duty.*" (Italics ours),

and the affirmative statement of the same rule in the later case of

The New York, 175 U. S. 182,

> "But the fact that a steamer is entitled to hold her course does not excuse her from inattention to signals, from answering where an answer is required, or from adopting such precautions as may be necessary to prevent a collision, in case there be a distinct indication that the obligated steamer is about to fail in her duty."*

and in the earlier case of

The Sunnyside, 91 U. S. 208,

> "Errors committed by one of two vessels approaching each other from opposite directions do not excuse the other from adopting every proper precaution required by the special circumstances of the case to prevent a collision; * * *
>
> "Cases arising in navigation where a stubborn adherence to a general rule is a culpable fault, for the reason that every navigator ought to know rules of navigation are ordained not to permit collisions but to save life and property by preventing such disasters,"

settle the law beyond question.**

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*Our opponents seek to accept the Delaware, and reject the New York upon the claim that the latter is governed by the old rules. As a matter of fact, both cases were under the old rules. But both are in point on the obligation of the privileged vessel to act *in special circumstances to avoid immediate danger.* As we have already pointed out (pp. 24-26, supra), the change in the rules relieving the privileged vessel from the duty of slackening speed or stopping or reversing when approaching another vessel so as to involve *risk of collision* does not relieve her of her obligation to act under the Special Circumstance Rule, etc., *to avoid immediate danger.*

**With the principle settled we are not burdening the body of the brief with extensive review of cases applying it to their infinitely varying facts. For convenience of reference, however, we are summarizing in Appendix A cases in which privileged vessels have been condemned for failing to take action to avert collision, and in Appendix B the cases which seem to be principally relied upon by petitioners.

The law being settled, the only question is one of application of this guiding principle to the particular facts of this case. We turn, therefore, now to the question whether a competent shipmaster standing on the bridge of the Svea during the long approach to this collision would, had he noted and observed what the Svea's master noted and observed, have had distinct indication that the Newport was not going to give way, and ultimately, of course, to the question whether it was the act of a competent shipmaster to hold the Svea's course and speed into the jaws of this collision without taking affirmative action to avert it. We take the liberty of emphasizing that the true enquiry is not how the master of the Svea *actually* appraised the situation but how he *should* have appraised it—seeing and noting what he did. All through the Svea brief the case is presented subjectively. We think it cannot be disputed that the test is objective rather than subjective. This was clearly recognized in

The New York, supra,

where the privileged vessel was held accountable, not for what she *actually* heard and saw but for what she *ought* to have seen and heard.

III.

THE SVEA RECEIVED DISTINCT INDICATION THAT THE NEWPORT WAS ABOUT TO FAIL IN HER DUTY, BUT NEVERTHELESS HELD COURSE AND SPEED INSTEAD OF TAKING AFFIRMATIVE ACTION TO AVERT THE THREATENED COLLISION, AND WAS PROPERLY HELD AT FAULT BY THE CIRCUIT COURT OF APPEALS.

1. In a collision occurring, as did this, on the open ocean, with perfect visibility, and nothing to obstruct navigation, there is a presumption of mutual fault, and the vessel (Svea) seeking to be excused, must exonerate herself by the clearest evidence. Inapplicability to this case of the rule of presumption and burden of proof argued in the Svea Brief (p. 30).

Where one vessel (the Newport) is clearly at fault, there are several general principles of collision law which might be urged as applicable. One, which has been urged by petitioner, is—

Where one vessel is guilty of clear fault which in itself is sufficient to account for the collision, the other vessel will not be found in fault by merely casting a doubt on the propriety of her navigation.

Svea's Brief, p. 30 citing

The City of New York, 147 U. S. 72, 85;

The Victory and *The Plymothian,* 168 U. S. 410, 423.

This principle has been applied in cases involving crossing courses where the privileged vessel has received no indication of the failure of the burdened vessel and is *suddenly* without warning placed in a situation of great and imminent danger.

The Binghamton, 271 Fed. 69 (2nd C. C. A.);

The Tasmania, 6 Asp. 517.

On the other hand, an equally well settled principle is—

Even flagrant fault on the part of one vessel will not excuse another from adopting every proper precaution to avert collision.

The Sunnyside, 91 U. S. 202;
The America, 92 U. S. 432, 438;
The New York, 175 U. S. 187.

But in the situation presented by this record we need not deal with generalities. The day was clear, the weather calm, the wind neglible, there were no other vessels in sight to complicate navigation, and the Svea had observed the Newport proceeding with unchanged bearing for some eight miles and had the open ocean, not a crowded harbor, in which to manoeuver. The courts have repeatedly stated that collisions of this character (when both vessels have had each other in view for a long time in broad daylight or clear night and manoeuvering is not hampered by other ships) seem impossible without the concurring negligence of both sets of navigators, that it is hardly possible that the stupidity or obstinacy of a single master can produce them and that both vessels will be deemed *prima facie* negligent and neither exonerated unless "upon the closest scrutiny of the navigation of each vessel it can be discovered that one of them was free from all culpable blame."*

Thus, in *The Tenadores,* 298 Fed. 740, the Circuit Court of Appeals for the Second Circuit, had before it the case of a collision between a burdened and privileged vessel on

Yang-Tsze Ins. Assn. v. Furness Withy & Co., 215 Fed. 859 (2nd C. C. A.)

crossing courses. The collision was on a clear day under conditions most favorable for navigation. After finding both vessels to blame in certain particulars, Judge Hough went on to say:

> "yet perhaps an equally satisfactory admiralty *rusticum judicium* is to summarily declare that at that place, and under the circumstances of wind, weather, tide, and traffic, and in the absence of any evidence of malice or intoxication, both sets of navigators are *prima facie* negligent, and both have failed to give any reasonable explanation of how they got into admitted disaster."

In *The Senator Rice,* 223 Fed. 524, Judge Coxe, in the same court, said with reference to a collision between vessels on crossing courses where the starboard hand rule applied:

> "That such a collision should have occurred in broad daylight at a time when there was nothing in the elements to interfere with navigation seems inexplicable. It is hardly possible that the stupidity or obstinacy of a single master could have produced such a result and we think the collision was due to their combined action. Where property and life are at stake, neither party should insist upon persisting in a course which is likely to result in disaster when the delay of a few moments will insure the safety of both."

In *The Coamo,* 280 Fed. 282, there was a collision at sea, on a calm, clear day, between a steamship and barge in a crossing tow where the steamship and tug were privileged and burdened vessels respectively under the Starboard Hand Rule. Judge Hough said:

> "It is not disputed, nor disputable, that a more inexcusable collision has rarely been presented to any

court. It occurred on a fair, clear day, in waters most familiar and then uncrowded, and between vessels which could without difficulty have seen each other for miles, and were (as to tug and steamer) full powered, fully manned, and in perfect repair. These are material facts in considering the probability of collision occurring without mutual fault."

In *Yang-Tsze Ins. Assn. v. Furness, Withy & Co.*, 215 Fed. 859, Judge Rogers said:

"The loss of property for which a recovery is sought was due to a collision on the high seas, in broad daylight and in clear weather, and with no other vessels about to embarrass or interfere with navigation. The two vessels involved were steamers, and therefore could be maneuvered more easily than any other kind of vessels. They were in plain sight of each other when miles apart. They nevertheless came into collision and with such force that one of them sank in a few hours, carrying down with her the entire cargo. It is difficult to see how it all happened unless both vessels were in fault and failed to exercise reasonable care.

Plain common sense constrains one to such a conclusion. To exonerate either of them under such conditions can be justified only if upon the closest scrutiny of the navigation of each vessel it can be discovered that one of them was free from all culpable blame."

In the very recent case of *The Comus*, 19 F. (2d) 774, Judge Manton said:

"Where on a clear night, two vessels see each other 6 or 7 miles apart, and then come into collision on the wide ocean, there is a heavy burden upon each of them to explain their navigation in an endeavor to exonerate themselves from fault."

In the Ninth Circuit, Judge Rudkin in the *West Hartland,* 2 F. (2d) 834, applied this same presumption.

The courts have sharply differentiated between cases such as the one at bar and those above cited, and cases involving crowded harbor navigation and sudden emergencies. It should be noted that Judge Hough, who in *The Binghamton* (which was a case of action in sudden emergency) said:

> "It is incumbent on her (burdened vessel) to prove affirmatively and conclusively the fault of the other vessel."

laid down the admiralty *rusticum judicium* in *The Tenadores,* supra, to which we have adverted, and also wrote the decision in *The Coamo,* supra.

Likewise in *The Tasmania,* supra (another case of sudden emergency), where the court held that great allowance should be made for the privileged vessel because suddenly placed in a situation of great danger, the court recognized that

> "If it had been daylight, so that the master of the Tasmania could have seen what the other vessel was, and how it was maneuvering, the obligation to act, might have been more imperative and immediate."

So, also, *David Wright Smith* in *The Law Relating to the Rules of the Road at Sea,* (Glasgow, James Brown & Son, "Nautical Press" 1910) points out (p. 169) that the rule to be applied differs according to whether there is sudden emergency or whether the burdened vessel has been observed for a long time to be persisting in her course.

"But where a vessel is placed in a sudden dilemma by the fault of another vessel, the course which a man adopts, if he has exercised his best judgment at the moment, need not be proved to have been the best thing possible. See the *Bywell Castle* case referred to in the case of *The City of Corinth v. The Tasmania,* on page 173. It must not be supposed, however, that the principle of the Bywell Castle case is ordinarily applicable to that of a holding-on vessel, forced to take action to avoid collision under Arts. 27 and 29 in consequence of failure on the part of the other vessel to keep out of the way. Where (as in the Nacoochee case, dealt with on page 176) a steamer suddenly looms up in fog at excessive speed and rams a sailing-vessel, it may be applicable in judging of the conduct of those on the latter vessel, and where (as in the *Tasmania* case, dealt with on page 172) one sailing-ship on a dark night suddenly and at close quarters alters her course, so as to present a different light to another sailing-ship which has the right of way, and thereby brings about imminent risk of collision, and in similar cases, it may be also applicable. But, where the giving-way vessel has been observed for some time prior to the collision, in clear weather, to be persisting in keeping her course, there is nothing sudden about the predicament in which the holding-on vessel is placed, and the principle of the Bywell Castle case can have no application."

Thus we think it fair to say that the rule of *The City of New York, The Binghamton* and *The Tasmania* is not applicable to the case at bar, but on the contrary there is a presumption that the Svea was in fault and a heavy burden placed upon her to exonerate herself for her failure to take affirmative action to avert the collision. For, as the cases have said, the negligent conduct of the Newport is not, under these circumstances, sufficient to account for the collision.

2. Apart from presumption, the Svea received distinct indication that the Newport was not going to give way.

Distinct indication is not positive assurance. In the nature of things the privileged vessel cannot ask to be guaranteed that the burdened vessel is about to fail in her duty before she moves herself. Difficult as the position may be for the master of the privileged vessel and though it unquestionably puts him on his mettle (as the English Admiralty Court finely phrases it in *The Nautik* case, infra) he must be satisfied to act on distinct indication. We submit that the Svea had such indication that the Newport was not going to yield.

We have reviewed the sequence of events leading up to the collision (pp. 8-12, supra). It seems difficult to conceive how more distinct indications could have come from a burdened vessel than those which came from the Newport. Her bearing throughout the entire thirty-three minutes that elapsed between the time she was sighted eight miles away and the time of the collision remained constant. During a goodly portion of this time the mate of the Svea, though scanning the bridge of the Newport through the glasses to see why the Svea's whistles were not answered, could see no one on the bridge and remarked upon that curious situation to the master. The master himself, when they got close enough to see with the naked eye, noted the same phenomenon. When the vessels were a full two miles apart both officers expressed apprehension. "It did not look very good" to Captain Rohberg (184), and the mate "wondered what he was going to do" (184). A one blast signal at two miles, a danger signal

at one mile and a second danger signal at three-eighths or half a mile were unacknowledged. If the Newport intended to give way, it was her duty to signal any change of course or reversal of engines by whistles (Article 28 quoted in footnote p. 9, supra), whereas slackening speed or stopping engines would have been manifested by change in bearing. Nowhere in the books have we found such a grouping of distinct indications that the burdened vessel was not going to give way. The combination of an apparently deserted bridge, three successively unacknowledged whistle signals, two of them danger blasts, and an unchanging course of a vessel whose unquestionable duty it was to give way, seem to us as powerful a grouping of indications that the burdened vessel was failing in her duty as one could put together.

3. The answer to the Svea's argument on "distinct indication" and her philological quibble.

Our opponents argue first that the Circuit Court of Appeals misstated the rule of the Delaware on distinct indication, secondly, that it did not find distinct indication, and, thirdly, that there was no distinct indication.

It is not easy to see how any one can fairly read the opinion of the Circuit Court of Appeals and seriously submit that it decided this case under the misapprehension that it was only necessary to find *some* indication that the giving way vessel was about to fail in her duty. It is true that in summarizing, without quoting, the rule of the Delaware, the opinion uses the words "some indication" instead of "some distinct indication". But the court was

not under any misapprehension about distinct indication being requisite. The opinion rests not on *some* indication but on an accumulation of persuasive indications which are reviewed and held to have made it "distinctly apparent" that the Newport intended to persist in her course. And the opinion refers to the testimony of experienced mariners that in their judgment the conduct of the Newport "clearly indicated" (244) that she did not intend to change her course.

Our opponents then proceed to state what the Circuit Court of Appeals meant by "distinctly apparent". We should hardly have supposed that this needed elucidation. Nothing surely is plainer than this, that when you say something became *distinctly apparent* to some one else, you mean that it became *evident* or *manifest* to him; that is to say that *apparent* is used in its primary meaning rather than its secondary meaning of *seeming* or *ostensible.* This case cannot turn on a philological quibble. It ought not to be necessary to go to dictionaries but, if one does resort to them, more light will be obtained by taking a definition, and the appropriate definition, than by selecting a part of a discussion on synonyms. In the Standard Dictionary, which our opponents use, definition number 1 of apparent is "clearly perceived or perceivable; easily understood; evident; as, his guilt is apparent." Definition number 2, is "easily seen or to be seen, open to view; visible; as, the beauty of the landscape became *apparent.*" Definition number 3 is "seeming; ostensible." It is the discussion under synonyms of apparent in this third sense that the Svea's brief gives us as the *definition* of

apparent. The Standard Dictionary also says that in connection with the preposition "apparent is used in the sense of evident", instancing "his guilt is apparent *in* every act *to* all observers." The language of the opinion of the Circuit Court of Appeals was that the conduct of the Newport made it "distinctly apparent," i. e., *evident* (of course *to* the Svea) that the Newport intended to persist in her course. You cannot say "made it distinctly *seeming* or *ostensible* to the Svea."

The Svea brief claims further that when the Circuit Court of Appeals says that the dereliction of the Newport became "distinctly apparent" to the Svea they meant that the Svea was *in doubt* about it. The Standard Dictionary however uses *doubtful* as an antonym rather than a synonym for *apparent*. In this connection our opponents refer to a passage in the opinion of the Circuit Court of Appeals in another case, the *West Hartland* (2 F. (2d) 834-836). This passage reads:

> "For some considerable time before the collision, the master of the West Hartland was in doubt as to the course the Governor intended to pursue, and under such circumstances it was his plain duty to solve that doubt in favor of safety by giving a danger signal or taking timely steps to avoid a collision before plunging his vessel into a position where a collision would be the natural, if not the necessary, consequence."

But the West Hartland was under the Inland Rules, Article XVIII, Rule 3 of which provides:

> "If, when steam vessels are approaching each other, either vessel fails to understand the course or intention of the other, from any cause, the vessel so

> in doubt shall immediately signify the same by giving several short and rapid blasts, not less than four, of the steam-whistle.'"

The citation by the Circuit Court of Appeals of the West Hartland in conjunction with this court's decision in *The Sunnyside* (91 U. S. 208), *The Delaware* (161 U. S. 469) and *The New York* (175 U. S. 187) followed by the statement that "the principle upon which the cases cited rest must control" (243) shows that the Circuit Court of Appeals was announcing no doctrine at variance with the rule of this court that the privileged vessel is to hold her course and speed unless and until she receives distinct indication that the burdened vessel is about to fail in her duty, when she herself must act to avoid immediate danger.

We therefore submit that the Circuit Court of Appeals accepted the requirement of distinct indication and found it.

That leaves for consideration the last feature of the Svea's argument that the finding was not correct. The fundamental fallacy both in the argument of petitioner and in the opinion of the district court seems to us to be in isolating and rejecting seriatim each indication as not sufficient in itself to constitute distinct indication instead of asking, as did the Circuit Court of Appeals, what was the cumulative effect of them all. Thus petitioners state (their brief, p. 20):

> "The Circuit Court of Appeals was in error in holding that the failure of the 'Newport' to answer the signals of the 'Svea' was the 'distinct indication' required by the Delaware rule."

They further state (their brief, p. 26):

> "The Circuit Court of Appeals was in error in holding that the failure of the 'Newport' to maneuver, immediately after the last signal from the 'Svea', was the 'distinct indication' required by the Delaware rule."

Both assertions misstate the holding of the Circuit Court of Appeals. The holding was:

> "The fact that the Newport failed to maneuver immediately after the last signal from the Svea, *when considered with the immediately antecedent facts and circumstances, as already outlined,* made it distinctly apparent, we think, that she intended to persist in her course and thus made the danger of collision manifest." (Italics ours.)

The "immediately antecedent facts and circumstances, as already outlined," are related in the preceding paragraph of the opinion (15 F. (2d) 343):

> "The mate of the Svea saw no one on the bridge of the Newport; the captain and the mate were concerned, for they knew that, if the courses were kept, collision was inevitable. When the ships were two miles apart, the situation 'did not look very good' to the captain of the Svea; a signal of one blast at two miles was not answered. A danger signal at one mile, and a second danger signal at three-eighths of a mile, were unanswered, and never any change in the course of the Newport."

Petitioners assert that failure of a burdened vessel to acknowledge whistle signals is not the "distinct indication" required by the Delaware rule and cite certain cases which hold that crossing signals by a burdened vessel are merely invitations to depart from the rules and are not *in themselves* distinct indication. It is of

course true that it will depend on the particular circumstances of each case whether crossing signals without more constitute distinct indication. There can be no doubt that in certain circumstances they do.

The Senator Rice, 223 Fed. 524 (2nd C. C. A.); appendix xviii, petitioners' brief, appendix xii;
The Tenadores, 298 Fed. 740 (2nd C. C. A.); appendix vii, petitioners' brief, appendix xiii.

The first case cited in the Svea's brief (p. 21) in support of the contention that crossing signals are not necessarily indication is *The New York,* as decided by the Circuit Court of Appeals for the 6th Circuit (86 Fed. 814). It is true that the Circuit Court of Appeals found that the holding on vessel had not received distinct indication, and exonerated her; but the case came to this Court on certiorari and it was here held that the holding on vessel *had* received distinct indication and the judgment was mutual fault (*The New York,* 175 U. S. 187).

Petitioners likewise assert that holding course by a burdened vessel is not distinct indication. Under certain circumstances this statement is also undoubtedly true. But under varying circumstances, especially where the burdened vessel has been observed for a long period of time to be persisting in her course, this fact alone has been held to be distinct indication rendering the privileged vessel at fault for not taking action to avert the collision.

The Sunnyside, 91 U. S. 208.

The steam tug William Goodnow was lying in Lake Huron three miles from shore near the head of the St.

Clair River. Her machinery was stopped, but she was drifting at from one to one and one-half miles per hour. She was showing proper lights. The bark Sunnyside was coming up the lake under a wholesail breeze and was making about nine miles an hour. The lookout of the bark saw the tug's lights when the vessels were about two miles apart and reported to the mate. The mate remarked that she was a steamer and appeared to be heading eastward, and added that he "guessed she would take care of herself." Apparently, neither he nor the lookout paid any further attention to the tug until the lookout sang out that the tug's light was close to the bow of the bark. It was then too late to do anything, and a collision occurred.

The applicable rules were those of 1864 (13 Stat. 58). Under Rule 18 the bark was required to keep her course and under Rule 15 the tug was required to keep out of the way. Although *The Sunnyside* arose under the old rules, it is, as has been submitted, direct authority for the instant case; for the privileged vessel was a sailing ship and hence under no obligation to slacken speed or stop or reverse when there was risk of collision. The situation of the bark was exactly that of a privileged steamer under the present rules.

The District Court held the vessels in mutual fault and the Circuit Court reversed, holding the tug solely at fault. This court reversed, holding that the bark should have taken steps to avert the collision. This court said:

> "Rules of navigation are adopted to save life and property; and they are required to be observed, and are enforced to accomplish the same beneficent end,

and not to promote collisions. Consequently, they have exceptions; and no party ought ever to be permitted to defend or excuse a plain error by invoking a general rule of navigation, when it is clear that the case falls within an admitted exception * * *

Where one of two vessels is required to keep out of the way, the other is required, as a correlative duty, to keep her course; but the act of Congress, following the usages of navigation, provides that that rule shall be subject to certain reasonable and necessary qualifications. Special circumstances may exist in particular cases, rendering a departure from the rule necessary in order to avoid immediate danger; and the act of Congress, among other things, expressly provides that nothing in the statutory rules shall exonerate any ship from the consequences of the neglect of any precaution which may be required by the ordinary practice of seamen or by the special circumstances of the case. * * * Errors committed by one of two vessels approaching each other from opposite directions do not excuse the other from adopting every proper precaution required by the special circumstances of the case to prevent a collision; as the act of Congress provides, that, in obeying and construing the prescribed rules of navigation, due regard must be had to the special circumstances rendering a departure from them necessary in order to avoid immediate danger. 13 State. 61; *The Maria Martin,* 12 Wall. 47; *The Lucile,* 15 id. 679. * * *

Negligence more manifest, culpable or indefensible, in view of the circumstances, is seldom exhibited in controversies of this character; and the only excuse offered for it is, that the eighteenth sailing rule provides, that, where one of two ships is required to keep out of the way, the other shall keep her course; entirely overlooking the fact that the mandate of that rule is declared by the rule itself to be subject to the qualification, that, in

obeying and construing the rule, due regard must be had to all dangers of navigation and to any special circumstances which may exist in any particular case, rendering a departure from the rule necessary in order to avoid immediate danger.

Years before the act of Congress referred to was passed, this court promulgated the doctrine, that rules of navigation are adopted to prevent collisions, and to save life and property at sea, and not to promote such disasters; and decided that the neglect of one of two approaching vessels to show the signal lights required by law did not vary the obligations of the other to observe the rules of navigation, and to adopt all such reasonable and necessary precautions to prevent the collision as the circumstances in which she was placed gave her the opportunity to employ. *Steamship v. Rumball,* 21 How. 383; *Chamberlain v. Ward,* id. 568.

Reasonable doubt cannot, we think, be entertained, that Congress in enacting the sailing rules intended to promote the same objects by substantially the same requirements; for which there is abundant confirmation in Art. 20 of the sailing rules, which is as follows:

'Nothing in these rules shall exonerate any ship, or the owner, master, or crew thereof, from the consequences of any neglect to carry lights or signals, or of any neglect to keep a proper lookout, or of the neglect of any precaution which may be required by the ordinary practice of seamen or the special circumstances of the case.' 13 Stat. 61.

* * * * * * *

All admit that steamships engaged in navigation are to keep out of the way of sailing ships when the two are proceeding in such directions as to involve risk of collision; and that the sailing ship under such conditions is to keep her course, subject to the qualifications contained in Art. 19 of the sailing rules, and subject to the obligation applicable to all

ships under way, which is ordained in the twentieth article of the same rules, that nothing contained in those rules shall exonerate any ship from the consequences of the neglect of any precaution which may be required by the ordinary practice of seamen or by the special circumstances of the case. * * *"

The court then discussed the possibility that perhaps the bark had not kept her course and said that this was not improbable; but said:

"* * * we prefer to rest the decision upon the ground that it was the duty of the bark, in view of the special circumstances, to have put up her helm and have gone to the right, or to have put it down and suffered the steam-tug to have drifted past in safety.

Cases arise in navigation where a stubborn adherence to a general rule is a culpable fault, for the reason that every navigator ought to know that rules of navigation are ordained, not to promote collisions, but to save life and property by preventing such disasters. In general, says Mr. Parsons, established rules and known usages should be carefully followed; for every vessel has a right to expect that every other vessel will regard them, but not where they will, from peculiar circumstances, certainly cause danger; as if a vessel, near a rock or shore, must strike it by putting her helm to port, which the general rule might require: and he adds, that 'no vessel is justified, by pertinacious adherence to a rule, for getting into collision with a ship which she might have avoided'; which is the exact case before the court. 1 Pars. Ship. and Ad. 580."

It will be noted that here the only indication of the failure of the tug was that she continued to drift along and took no steps to get out of the way. Yet this court

held that her failure should have been observed by the sailing vessel which should have taken affirmative action by change of helm to avoid collision.

Nautik v. Oostvoorne, 6 Lloyds List 110.

Petitioners state (brief, appendix xv), that this is not a case of crossing, but of overtaking vessels. They were originally overtaking but became crossing vessels as stated in the excerpt below.

The Nautik and the Oostvoorne were both approaching a pilot cutter off the entrance to the River Thames. The Nautik was privileged and the Oostvoorne burdened under the starboard hand crossing rule. The vessels sighted each other when two and one-half miles apart. The master of the Nautik stopped his engines to take off speed as he approached the cutter in order to take a pilot, but held her course. The Oostvoorne did not change course and a collision resulted. The Nautik reversed shortly before the collision. The court decided that the Nautik, which had observed the Oostvoorne approaching upon a dangerous course, should have taken affirmative action to avoid the collision before she did, and held her in mutual fault for the collision. The court said (page 112):

> "I have had the difficult task of considering whether the Nautik was also to blame. The events in question here took place in broad daylight, and these two Masters were in a position to see well what was going on. The Master of the Nautik was well aware of the rule with regard to crossing ships, and he decided to stand upon his rights. He acted, as I am advised, with good seamanship in his approach provided he took sufficient account of the

proximity and action of the Oostvoorne. But the Oostvoorne was proceeding upon a dangerous course during, at any rate, four or five minutes before the collision. During two or three minutes before the collision her course was a course of very considerable danger. It is said by the Master of the Nautik that he had no warning, that he had no signal of what was taking place, but he agrees that at a minute and a half before the collision he could have avoided it by helm action. He is doubtful about a minute before the collision and he thinks that at half a minute he could not have avoided it. He is wise in thinking that, because he took his helm action probably at half a minute and more before the collision.

I have anxiously considered the case of the Nautik, but I have come to the conclusion that the Master of the Nautik stood upon his rights to a dangerous extent. After all, if your right is to take a particular course at sea, and that course will inevitably produce collision, it is not yourself alone you are risking, it is other people's property and other people's lives. And there is in the regulations with regard to collision a regulation which requires people to exercise judgment when following the rules will result in collision.

I am not able to absolve the Master of the Nautik from blame. I think he was put upon his mettle by a course of action by which his rights were being encroached upon. That consideration does not absolve him from blame. I have come to the conclusion that the Nautik could within the period of danger—the period of a few minutes before the collision—have taken steps which might have avoided it, and I have come to that conclusion upon the advice of the Elder Brethren. They consider that as a matter of good seamanship he should have taken action. Standing on in the determined way in which he did invited disaster."

The advice of the Elder Brethren referred to in the last paragraph is significant in view of the fact that the master mariners examined as experts in the present case were all of opinion that as a matter of good seamanship the Svea should have acted and that standing on in the determined way she did invited disaster (McKinnon, 108 ff; Heygendorff, 127 ff; Warner, 133 ff; Winslow, 138 ff; Blanchfield, 142 ff.)

In

The Coamo, 280 Fed. 282 (2nd C. C. A.),

the privileged vessel had observed the burdened vessel approaching and failing to give way. When about 2700 feet from the point of collision the second officer of the Coamo, who was on watch, lost his head, hard-starboarded and a collision resulted. Judge Hough held the privileged vessel in fault for not sooner realizing the danger and when it was realized, for doing exactly the wrong thing. The privileged vessel sought to be exonerated on the ground that she was *in extremis* when she acted. As to this, the court said:

> "there was no excuse in permitting the situation to become in extremis."

See also

The Jason, 288 Fed. 57;
The George S. Tice, 287 Fed. 127 (2nd C. C. A.);
The Devonian, 110 Fed. 588.

Under the above authorities it would seem that the mere fact that the Svea observed the Newport persisting in her course for eight miles and thirty-three minutes

would *in itself* constitute distinct indication. And when we consider the additional cumulative indications which were received, we do not see how there can be any doubt about it.

Petitioners have only partially stated the facts which should have given the Svea distinct indication. They have omitted all reference to the fact that both the master and mate of the Svea noted that during the long advance there was apparently no one on the bridge of the Newport and that this phenomenon was the subject of much concern.

But entirely apart from any consideration whether either failure to acknowledge whistle signals, persistence in course, or apparently deserted bridge standing alone constitutes distinct indication, we submit that petitioners' approach is unsound and that these various indications cannot be isolated.

We repeat that the fallacy in the Svea's argument, and, we respectfully submit, in the opinion of the District Court, consists in taking up separately each successive incident during the long approach of the two vessels and rejecting it as not necessarily of itself constituting distinct indication that the Newport was not going to yield.* The sounder method, we suggest, is that which was fol-

*The District Court was, no doubt, led in part to excuse the Svea by its clearly erroneous finding that when the second danger signal was blown the vessels were only about 200 feet apart (66). It is true that the mate of the Svea testified that at this time the Newport was only about a ship-length off (152) and in another place from 200 to 300 feet away (164); but this opinion cannot stand against the positive evidence of the master of the Svea that at this time the distance between the vessels was three-eighths to half a mile (186, 203), which counsel for the Svea themselves accept (72, petitioners' brief, p. 4).

lowed by the Circuit Court of Appeals which appraised this moving panorama as a whole instead of incident by incident, thus viewing *all* the occurrences as merging into one picture of what was seen and noted from the bridge of the Svea. The Circuit Court of Appeals found in effect that each indication as it was received was consistent with and confirmatory of the previous indications and that the cumulative effect of them all considered as a whole made it "distinctly apparent" that the Newport was not going to give way.

4. Having received distinct indication, the Svea was at fault for not acting.

Where the circumstances are such that the conduct of the burdened vessel would not distinctly indicate to a master of reasonable skill and prudence that she was not going to give way, the privileged vessel need take no action so long as the other vessel can avoid her by porting. But where the previous indications *are* distinct, we do not see how, in the light of the authorities, there can be any uncertainty as to the duty of the master of the privileged vessel to take affirmative action by stopping, reversing or altering helm, according as the one course or the other commends itself to his best judgment in the particular circumstances. The decision what he should do and precisely when is, we think it must be conceded, often a difficult and, as some of the cases say, painful one for him to have to make. But we conceive (and the authorities we think are quite clear about this), that if he exercises his judgment in this regard reason-

ably and the burdened vessel which has put him to the necessity of the decision acts concurrently and thereby brings on the collision, the privileged master will not be condemned. The one thing for which he will and must be condemned is refusal to act at all. That he must not do. In other words he cannot escape the duty of acting by refusing to act. Otherwise of course the safe line, so far as liability is concerned, for the privileged master always to take would be to keep his course and speed, regardless, to the end. Then the qualifying rules of special circumstances and the authorities saying that, where there is distinct indication that the burdened vessel is failing the master of the privileged vessel must act, would be nullified. To construe the decision to hold course and speed under such circumstances as reasonable exercise of judgment to avert the collision would be to abrogate altogether the requirement that the privileged vessel must depart from the rule when she has distinct indication that the burdened vessel is not going to keep out of the way.

Yet this is precisely the plea of the master of the Svea in this case. His answer to questions what he did at each successive stage is the recurring refrain "I held my course and speed." His reason for so holding course and speed was that he "had the right of way." His own counsel interrogated him as to why he decided to keep on after no attention was paid to his second danger signal.

> "Q. Why did you decide to go ahead?
> A. Because I had the right of way." (213.)

While Svea counsel think primarily of the hold on vessel's *duty*, one has only to read the testimony of the

master of the Svea to see that *he* was thinking chiefly of his *right*.

He claims that he did not realize that the Newport was not going to yield until she was only a shiplength off (203). The question however is whether a competent shipmaster would have realized—had "distinct indication"—far sooner that the Newport was not going to yield and would have diverted his ship to avoid the collision instead of holding course and speed into it.

For as has been said before, the test is objective. This court emphasized this in *The New York* where it held her officers responsible for the lights and whistles they should have seen and heard regardless of actual seeing and hearing. And Lord Herschell forcibly states the objective standard in

City of Corinth v. Tasmania, 15 A. C. 223,

as follows:

> "Although, having regard to the relative position of the two vessels, it was the duty of the Tasmania to keep her course, it is clear that she would not be justified in blindly persisting in that course if it were manifest that disaster must result from it. It is provided by Rule 23 (Art. 27 of present Regulations) that, in obeying and construing the rules, due regard shall be had to any special circumstances which may render a departure from them necessary in order to avoid immediate danger. *As soon then as it was or ought to a master of reasonable skill and prudence to have been, obvious that to keep his course would involve immediate danger, it was no longer the duty of the master of the Tasmania to adhere to the 22nd Rule. He was not only justified in departing from it, but bound to do so, and to exercise his best judgment to avoid the danger which threatened.*" (Italics ours.)

It is true that the master of the privileged vessel in this case of *The Corinth* and *The Tasmania* was exonerated for failure to act sooner than he did but on the ground that the gross negligence of the other vessel had placed him *suddenly* in a difficult position—a ground of exoneration which the master of the Svea cannot plead.

The master of the Svea attempts to justify his failure to act at all with the plea that if he had done something in an effort to avert the threatening collision, the Newport despite all indications to the contrary, might at the eleventh hour have come to life herself and "If I acted, and if he acted, there would be a collision sure" (214). But that defense, as we have pointed out, could be offered by a privileged vessel in every case and the decision of the master of the Svea that "If I acted there would be some mistake, and so I came to the conclusion to keep my course and speed" (214) would simply be an abrogation of the rule that a privileged vessel must act to avert collision when the distinct indications are that the burdened vessel is going to fail in her duty. The fear of the master of the Svea that he might be blamed in the contingency contemplated by him is groundless. The authorities are quite clear that if the privileged vessel acts reasonably in the exercise of her best judgment and departs from course and speed when she has received distinct indication that the burdened vessel is not going to yield and then the burdened vessel suddenly changes and collision ensues, the privileged vessel will be excused.

The Zampa, 113 Fed. 541 (N. D. Cal.)

The ship Reliance was sailing close hauled on the starboard tack at night in the Pacific when she saw the red

light of the schooner Zampa off her port bow at a distance of a mile and a half. The Zampa soon showed both lights and thereafter her green light only. When the Zampa was quite close and almost directly ahead still showing her green light, the officer in command of the Reliance, believing a collision otherwise inevitable, changed his course to port. Immediately afterward the Zampa changed her course to starboard and a collision resulted. The Reliance was the privileged vessel and under the rule was required to hold her course and speed. It was held that under the circumstances the Reliance was justified in changing her course when she did, and that the Zampa was solely at fault.

The court said (page 543):

> "The question here is whether, at the time the Reliance changed her course, the officer in command was justified in believing that the Zampa was about to fail in her duty to keep off, and that there was immediate danger of collision, unless her course was changed. She had a right to depart from her course if necessary in order to avoid immediate danger, and, having this right, it must follow that, if the officer in command exercised a reasonable judgment in view of all the conditions then present, the action taken by him in changing the course of the Reliance cannot be attributed to her as a fault."
>
> *The Charles A. Campbell,* 142 Fed. 996.

In this case the schooners the Whiton and Campbell collided off the coast of Cape Cod. The vessels were on nearly opposite courses and saw each other several miles away. The Campbell was the privileged vessel and the Whiton the burdened one. The Whiton continued to approach and to bear more nearly ahead, all the time show-

ing her red light only until the red light was almost directly ahead and the Whiton only a few lengths away, so near that collision was unavoidable unless something was done. The privileged vessel changed course shortly before the collision and the burdened vessel thereafter. A collision resulted. The Campbell was held not in fault for changing course, and the Whiton held solely in fault for failing to keep out of the Campbell's way.

The court said (page 1001):

> "The Campbell did not hold her course until the vessels came together, and it remains to consider whether her failure to do so was a fault contributing to the collision. Under the circumstances as I find them to have been, I do not think it can be so considered. From the time the Whiton had first been seen a change of course on her part tending to keep her out of the Campbell's way had been expected by those on the Campbell. Such a change they had a right to expect, but instead of it they saw the Whiton keep on into a situation which became more dangerous as the vessels got closer. The longer she continued to do so, the more strongly did her management indicate that the persons navigating her were not aware of the danger and could not be relied on to do what was required of them in avoiding it. Under such circumstances, change of course on the part of the vessel not having the duty of keeping clear, is not always fault on her part. If made to avoid a collision which in the best judgment of a competent navigator then seems otherwise unavoidable, it is held not to be fault. The City of Augusta, 80 Fed. 297, 25 C. C. A. 430; The Zampa (D. C.), 113 Fed. 541; The Queen Elizabeth, 122 Fed. 406, 59 C. C. A. 345. The competence of the Campbell's master is established by many years' experience in commanding similar vessels. The careful observation of the Whiton during her approach and

the avoidance of any change of course on the Campbell's part until the red light was close under her bow, are, in my judgment, sufficient to show that the order to luff was such an exercise of his best judgment as should prevent its being regarded as a fault."

The Queen Elizabeth, 122 Fed. 406 (2nd C. C. A.).

Here a privileged vessel was held not chargeable with contributory fault for a collision with a crossing steamer in the night because of her change of course where such change was not made until immediately before the collision when the vessels were within a few hundred feet of each other, and when it became apparent that the schooner was attempting to cross ahead in violation of the rules. The lower court had held the privileged vessel at fault. The appellate court said (page 408):

"In this finding we are unable to concur. Unquestionably the failure of the ship to keep her course was a violation of the strict letter of Article 21, but we think that the omission to observe the rule was justifiable under the qualifying language of Article 27 and that, if it were an error, it was made in extremis. Article 27 provides that in obeying and considering the steering and sailing rules 'due regard shall be had to all dangers of navigation and collision and to any special circumstances which may render a departure from the above rules necessary in order to avoid immediate danger.' In other words, a vessel should not adhere obstinately to the rules when disaster can be avoided by a departure from them. As was said in The Elizabeth Jones, 112 U. S. 514, 524; 5 Sup. Ct. 468, 473; 28 L. Ed. 812.

'There is no idea appertaining to keeping a course which justifies holding to it in such a way as to bring on a peril. The only principle inherent in it is to so act as to enable the other vessel, on whom the

duty rests, to adopt with success means of getting out of the way.' "

The Shawmut, 261 Fed. 616.

Here there was a collision between the schooner T. Morris Perot and the steamer Shawmut. The Shawmut was the burdened vessel and failed to get out of the way. Just prior to the collision the schooner starboarded her helm in an attempt to avoid the contact. It was held that the schooner was not in fault, the court saying (page 622):

"There is no doubt that the steamer ported her helm, and it may be (although this finding we cannot make) that she would have cleared the schooner if the latter had held her course, and it may further be that the schooner used bad judgment in putting her helm to starboard. The judgment exercised, however, was under the evidence a hasty judgment, forced upon the schooner by the steamer, and although bad judgment, or even a mistake in judgment, may be evidence justifying a finding of negligence, it will not justify such finding when it is excused by an emergency created by the negligence of the one who makes the complaint of bad judgment.

We are influenced in reaching the conclusion we have reached by the fact that the steamer should have made out the schooner in ample time to have moved outside of what we have called the zone of collision, and did see the schooner, as is admitted, in time to keep out of her way. The collision nevertheless occurred, and the steamer can escape a finding of culpability only by the facts, making it clear that the collision occurred through some cause other than failure in her duty to give the schooner sea room.

In every one of the long line of cases to which we have been referred by the proctor for the steamer in

his clear and very helpful discussion of this case, it will be found that the sailing vessel, held responsible for collision with a steamer, had changed her course, not because of necessity, born of some danger of navigation, or of some emergency decision forced upon her by the negligence of the steamer, but because she unexpectedly changed her course wholly for her own convenience, or to get some benefit or advantage which might have been deferred until the danger of collision was past."

The Montauk, 180 Fed. 697 (2nd C. C. A.).

Here the ferryboat Montauk on her way across the East River to a Brooklyn slip came into collision with transfer tug 18 which was coming up with a car float on each side. The Montauk three times blew signals of two whistles which were not answered. The tug kept her course until immediately before collision when she changed slightly to port and the Montauk held her course. Before collision both vessels reversed full speed astern. It was held that the Montauk was solely at fault for not keeping out of the way of the tug. The change of course of the tug was excused, the court saying:

"The only fault which could be imputed in our opinion to the transfer was her failure to hold her course and speed as required by article 21 of the Inland Rules. But her failure to do this, if not justified under article 27 to avoid immediate danger in the special circumstances of the case, was not a fault, but an error in extremis, when the collision owing to the gross fault of the Montauk was imminent."

5. The time for action by the Svea was when there was room for her to act effectively so as to avert the threatened collision by her action alone.

It being unquestioned law that no general rule of the road gives a vessel the right to run into collision, but that "the saving rule of special circumstances flavors every other rule with the salt of caution and common sense" (*La Lorraine,* 12 F. (2d) 436, 437), the question naturally suggests itself—when should the Svea have taken action?

It must be taken as settled that where the privileged vessel receives no distinct indication of the dereliction of the burdened vessel she is justified in maintaining course and speed so long as the burdened vessel can avoid her by porting.

The Delaware, 161 U. S. 459.

See also

The Binghamton, 271 Fed. 68.

But where the privileged vessel *does* receive distinct indication that the burdened vessel is not going to give way we submit that the true rule is that she must take action at a time when she can save the day *by her own action alone.* For otherwise, it seems to us, the beneficial results sought to be gained by having her take action will be vitiated. Her duty to take action is predicated upon the *distinct indication* that the burdened vessel will not do so; and if she is allowed to go past the point where she can avert catastrophe unaided and the burdened vessel acts as she *indicates* she will, it is then too late. There is immediate danger of collision within the rule of special circumstances when she has had distinct indication and

reached that point. Hence, we submit that the Svea, having received distinct indication that the Newport was not going to give way is at fault for not taking action at a time when she could have avoided the collision. It is submitted that the cases bear this out.

The Sunnyside, 91 U. S. 208;
The New York, 175 U. S. 287;
The Coamo, 280 Fed. 282 (2nd C. C. A.);
The Jason, 288 Fed. 57;
Nautik v. Oostvoorne, 6 Lloyds List 110.

If it be asked what the Svea should have done to avoid the collision, the answer lies in the mouth of Captain Rohberg, the master of the Svea. He testified that after he blew his third signal (the second danger signal) he could have avoided the Newport by either starboarding or reversing his engines (203, 205). By that time he had received the cumulative indications to which we have adverted that should have had the force of a positive radio message reading "the Newport is not going to give way".

Should this court sustain the finding of the Circuit Court of Appeals that the Svea had distinct indication of the Newport's dereliction in time to act herself, that will, it is submitted, be an end of the case; for the Svea did not act; and the point of our next chapter will be superfluous. If, however, this court should come to the conclusion that the events recited did not constitute distinct indication to the Svea that the Newport was not going to yield, we respectfully submit that, nevertheless, the judgment of mutual fault should stand. For

IV.

EVEN IN THE ABSENCE OF PREVIOUS DISTINCT INDICATION THAT THE BURDENED VESSEL IS ABOUT TO FAIL IN HER DUTY, THE PRIVILEGED VESSEL MUST DEPART FROM HER PRIMARY DUTY OF HOLDING COURSE AND SPEED AND HERSELF ACT TO AVERT COLLISION IF SHE CAN DO SO AFTER THE BURDENED VESSEL CAN NO LONGER AVOID HER BY PORTING. THE SVEA COULD HAVE AVERTED THIS COLLISION BY HER OWN ACTION, EVEN AFTER THE NEWPORT COULD NO LONGER AVOID HER BY PORTING.

1. The rule as declared by this court.

As has been previously stated, this court declared in *The Delaware*, 161 U. S. 459, on the basis of its previous decisions that the law was settled

> "* * * that the preferred steamer will not be held in fault for maintaining her course and speed, so long as it is possible for the other to avoid her by porting; at least in the absence of some distinct indication that she is about to fail in her duty."

The latter part of this statement of the law has been dealt with and, as we have suggested, we think disposes of the case. But, even if it should be found that the Svea did not have previous distinct indication of the Newport's dereliction, the Svea should still, we submit, be held to blame under the former part of this statement of the law.

2. The Svea could have averted the collision after the time when the Newport could no longer avoid her by porting.

The Newport and the Svea were normal ships as concerns maneuvering. Captain Rohberg said the Svea

"would turn fairly good" (194). Captain McKinnon said the Newport was "a handy ship to handle." (124)

The Svea was almost exactly one-half the length of the Newport. She was 174 feet long (179) and the Newport 337 feet long (107). The Svea was also slower than the Newport (107, 181). It cannot be disputed that under normal conditions the shorter the vessel and the slower the speed, the shorter is her turning radius.

Knight—Modern Seamanship, 8th ed., p. 326 ff.

This fact has been judicially recognized.

The Coamo, 280 Fed. 282, 285 (2nd C. C. A.):

> "It is a matter of record in reported cases (The Lepanto (D. C.), 21 Fed. 651; The Aurania (D. C.), 29 Fed. 98, 121, and especially The Normandie (D. C.), 43 Fed. 151, 159), and in published works of approved authority (Knight's Modern Seamanship, p. 195), how, with what speed, and with what radius of turning, vessels both smaller and larger than the Coamo will act under a hard over wheel. Within limits, the shorter the ship and slower the speed, the shorter the turning radius;"

The Svea being only about one-half the length of the Newport and of slower speed it follows that for some appreciable time after the Newport was powerless to avoid her by porting, the Svea could still have saved the day by prompt action. She did nothing. Hence, she would be at fault had she received no previous distinct indication that the Newport was not going to give way.

V.

THE CLAIM OF THE SVEA THAT THE NEWPORT COULD HAVE AVOIDED HER BY PORTING UNTIL THE VESSELS WERE ONLY A SHIP-LENGTH APART IS WITHOUT FOUNDATION IN THE RECORD AND SUCH MANEUVER WOULD BE A PHYSICAL IMPOSSIBILITY.

Petitioners repeatedly assert (Svea's brief, 4, 9, 29) that the Newport could have avoided the Svea by porting until the vessels were a ship length apart and cite the testimony of Captain McKinnon to substantiate the assertion (Svea's brief, 4, 29).

In the first place, this would be a physical impossibility for any vessel (see Knight, *op. cit.*). In the second place, Captain McKinnon testified to nothing of the kind. Captain McKinnon's testimony was that if the wheel were put over the vessel would start to *turn* within a shiplength (124). This cannot possibly be construed to mean that she could *avoid* the Svea in a shiplength.

No doubt the vessel would start to *swing* within a shiplength, i. e., feel her helm. But it is a matter of general knowledge, that when the helm of a vessel is put hard over, the whole mass of the ship, except the extreme bow, is thrown to the side *opposite* from that toward which it is desired to gain ground. The stern sweeps out a circle considerably larger than that traced by the bow and does not clear the line of the original course until it has traveled several shiplengths.

Knight—op. cit.

We submit that petitioners' statement that the Newport could have avoided the Svea by porting until the vessels were a shiplength apart is unfounded.

VI.

THE AUTHORITIES RELIED ON BY PETITIONERS DO NOT EXONERATE THE SVEA.

We have previously suggested (supra, p. 28), that in collisions of this character, the question of whether the "special circumstance" rule is applicable must of necessity depend upon the peculiar facts of each particular case. Except as a general principle is laid down no case may properly be said to be a precedent for any other. We submit that the authorities relied on by petitioner are in harmony with the views sought to be expressed in this brief, while their facts are easily distinguishable from those presented in the case at bar. All of these cases recognize that it is the duty of the privileged vessel to act when she has indication that the burdened vessel is about to fail in her duty.

For these reasons we feel, as we have stated in an earlier part of the brief, that no useful purpose would be served by lengthening the body proper of this brief through an extensive review of cases and accordingly deal in Appendix B with the cases which seem to be principally relied upon by petitioner—with the exception, however, of *The Delaware*, 161 U. S. 459.

With the Delaware we deal here because petitioners rest their case primarily upon it and, comparing it with the case at bar, assert that "it would be difficult to find a more analogous condition of facts." (Svea's brief, p. 33.)

The *law* as stated in the Delaware is accepted by both parties to this controversy. But we cannot agree that

on facts The Delaware is analogous to this *Newport-Svea* case. On the contrary they sharply and emphatically differ in the very connections that are the foundation of the controversy, namely, whether the master of the privileged vessel did or did not have distinct indication that the burdened vessel was derelict.

Reference to the map entrance to the Port of New York (given in the report of the case in the National Reporter System, 16 S. Ct. 518) will be helpful in connection with the description of the collision:

The collision was between the Delaware and an ocean tug called the Talisman towing a pilot boat. It occurred in Gedney Channel, a dredged entrance to the harbor of New York. The northern line of this channel was marked by a series of red buoys and the southern line by a series of black buoys. The Delaware was about to come into New York harbor through this channel. The Talisman was proceeding diagonally from the inner end of the channel toward the pilot station which was near the black fairway buoy at the southerly outward or ocean entrance of the channel.

The weather was cloudy and overcast with rain squalls following, so that the vessels, after sighting each other originally, were shut out from view of one another again until four or five minutes before the collision, when they were probably a mile or more apart. Then they sighted each other once more and were in view of one another until collision occurred.

At this juncture the Delaware made the outer red buoy marking the northerly line of the entrance to Gedney

Channel about a point on her port bow and starboarded one point to bring the buoy on her starboard bow. With the Talisman diagonally crossing the channel as above stated, the vessels were on crossing courses at about right angles to each other. The Delaware had the Talisman on her starboard hand. Therefore, the Delaware was burdened and the Talisman was privileged under the starboard hand rule.

> "The Delaware made no effort to avoid the tug. Instead of porting as she entered the channel, and passing up the starboard side and astern of the Talisman, the pilot kept her on her course until about a minute before the collision, when the master, who had been below, ran hurriedly on the bridge, and seeing the Talisman about three points on his starboard bow, and close at hand, ordered the helm hard a-starboard, and the engine stopped; though both orders were given too late to be of any service."

The Delaware struck the Talisman on her port quarter and she was a total loss. The Delaware was grossly at fault and no claim was made to the contrary. The question was whether the Talisman was also at fault. The main fault charged was that she should, though the privileged vessel, have taken steps herself to avert the collision. After reviewing various diverging views the court announced that, in view of its previous decisions, the law must be taken as settled,

> " • • • that the preferred steamer will not be held in fault for maintaining her course and speed, so long as it is possible for the other to avoid her by porting, at least in the absence of some distinct indication that she is about to fail in her duty."

The court thus recognizes that there would have been a duty on the part of the Talisman to take action had she had distinct indication that the Delaware was about to fail in her duty, but said:

> "In the case under consideration there was really nothing to apprise the tug that the Delaware would not port and go under her stern, until the collision became inevitable. The vessels were in plain sight of each other. The Delaware was entering a channel, whose course was marked by buoys, and she could not possibly have continued her then course without soon crossing the line of black buoys, which marked the southerly edge of the channel. There was every reason to suppose that, as soon as she passed the line of red buoys at the northerly edge, she would port and take her proper course up the channel * * *."

The Talisman had twice blown single whistle blasts indicating that she intended to hold her course. Neither of these signals had been acknowledged by the Delaware.

With regard to the contention made that the failure of the Delaware to acknowledge the signals of the Talisman should have apprised the Talisman that the Delaware was about to fail in her duty, the court said:

> "It is true the Delaware did not answer the signals of the Talisman as she should have done, but Captain Winnett, who was in charge, testifies that he was under the impression that she answered the first whistle, and made an allegation to that effect in his libel. He appears to have been mistaken in this, but as the morning was somewhat thick he might have thought so, and was not in fault for acting upon that hypothesis."

The second whistle was held to have been given when the vessels were *in extremis* but, even as to it, "three of

the libelant's witnesses from the Talisman seemed to have understood that it was answered."

This case expressly recognizes distinct indication of failure by the burdened vessel as calling for action by the privileged vessel, but under the facts of the case (the customary channel course and the justifiable belief that whistle signals were answered) could hardly find other than non-indication. The facts are not truly comparable with those of the case at bar, with its combination of cumulative and persuasive indications heretofore reviewed.

We respectfully submit that the judgment of mutual fault should be affirmed; with costs to respondents in this court and in both courts below.

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(APPENDIX FOLLOWS)